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Teaching Economic Torts

Jay Feinman
Rutgers University-Camden

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Jay M. Feinman[1]

The primary goal of this Article is to proselytize for the teaching of an economic torts course in the upper-level law school curriculum, particularly a course that focuses on the business torts that form the core of a typical non-personal injury civil litigation practice. In service of that goal, the Article surveys traditional and contemporary efforts to define the scope of economic torts and to provide teaching materials, identifies some themes and issues in those efforts, and comments on teaching methods that are particularly appropriate for the course.

Tort law is, of course, a staple of the first-year law school curriculum, and most tort courses spend the bulk of their time on issues arising out of physical injuries to persons and, to a lesser extent, property. This focus is driven partly by the conceptual structure of tort law, in which intentional torts or perhaps negligence provide the paradigm case of tort liability. The focus on personal injuries has intensified in recent decades as a result of developments in the law and in law schools. The body of tort law has expanded to encompass such topics as products liability, negligent infliction of emotional distress, alternative compensation schemes, and mass torts, so there is simply more to cover within the realm of personal injuries. At the same time, many law schools have reduced the time allocated to the torts course from the traditional two semesters to one, limiting the time available for peripheral subjects such as economic torts.

This is an opportune time to consider whether and how economic torts should be taught. The American Law Institute, having addressed physical injuries, products liability, and apportionment of liability as part of its third effort at restating tort law, is now drafting a Restatement of Economic Torts and Related Wrongs.[2] Dan Dobbs, author of a highly regarded torts treatise, and his co-author Ellen Bublick have recently edited a comprehensive, highly teachable casebook on advanced torts which devotes substantial attention to economic torts.[3] In practice, disputes involving economic torts are expanding as a mainstay of civil litigation practice, both because of the apparently infinite capacity of businesses to engage in questionable and dispute-generating behavior and because of the entrepreneurship of

1 Distinguished Professor of Law, Rutgers University School of Law, Camden.

2 RESTATEMENT (THIRD) OF ECONOMIC TORTS AND RELATED WRONGS (Council Draft No. 1, 2006).

3 DAN B. DOBBS & ELLEN M. BUBLICK, CASES AND MATERIALS ON ADVANCED TORTS: ECONOMIC AND DIGNITARY TORTS—BUSINESS, COMMERCIAL AND INTANGIBLE HARMS (2006).

lawyers as the profitability of personal injury litigation declines due to the success of the tort reform movement in contracting the rights of victims of personal injuries. Because the upper-level torts course often has a strong civil litigation focus, the course presents opportunities to respond to the current manifestation of the continual ferment about reshaping the third year of law school away from pure doctrinal courses and toward courses that synthesize areas of doctrine and lawyering skills.

The construction of an advanced torts course requires making choices about the inclusion and arrangement of doctrines and choices about the pedagogical approach, which includes the selection of materials and creation of activities for students. The Article addresses each of these choices in turn.

I. Approaches to Teaching Advanced Torts

An advanced torts course is, to an extent, remedial, filling gaps left by the focus on physical injuries in the first-year course. Typically, the gaps are large, and the problem is not a new one; Chesterfield Oppenheim commented in 1936 that "the scope of the first year course in Torts is already so formidable as generally to preclude an adequate consideration of cases on trade relations."[4] Because the course is partly remedial, the content and approach of the course at a particular school will be influenced by the coverage of that school's first-year course. Nevertheless, the course should have a conceptual and pedagogical integrity of its own. Moreover, as the allocation of time to the first-year course declines in many schools and as casebooks for that course more and more coalesce on a limited number of doctrines, the gaps become more common across schools and the objectives of the advanced course become more common as well.

Courses on many legal subjects have a structure that is at least initially obvious because there is an accepted doctrinal structure to the subject matter. In torts, there is a conventional classification of intent, negligence, and strict liability, with additions or modifications such as products liability or injuries to real property. In contracts, the accepted doctrinal structure is formation, validation, performance, remedies, and third-party rights. Most casebooks and courses, with some novel exceptions, largely follow these structures. Perhaps because of its peripheral status, the legal field of economic torts has never developed an accepted doctrinal structure, either in general or for teaching purposes. And efforts to do so have never met with general acceptance. This section surveys the principal attempts to conceptualize the subject for teaching purposes.[5]

4 S. Chesterfield Oppenheim, Cases on Trade Regulation 4 (1936).

5 Scholars, particularly in the Commonwealth, have conceptualized the field independent of teaching. Hazel Carty refers to the project of classifying economic torts as "an obvious challenge to create order out of their chaos." Hazel Carty, An Analysis of the Economic

One approach to the advanced torts course might be simply to regard it as residual, designed to survey all topics excluded by the emphasis on personal injury in the basic course. Several of the casebooks under discussion recognize the need to accommodate the concern of residual coverage. If taken too far, however, this approach is uninteresting from an intellectual point of view and largely unsatisfactory from a pedagogical point of view. For the most part, the scholarship and teaching materials on the subject manifest an explicit or implicit recognition of the point that legal subjects ought to be coherent, and that coherence comes about through the implementation of some theory of the subject.[6]

Aside from being intellectually satisfying, a general theory of the course is actually useful to students. In understanding doctrines, it helps to have a big picture, or several big pictures, to establish connections among doctrines and suggest themes and policies that underlie them. This is particularly important in a field as fluid as economic torts, in which much of the doctrine has developed or been reformulated in recent years and is still in flux. The ability of lawyers and judges to make arguments and decide cases best rests on a broad and deep understanding of the issues that can only be achieved by having a conceptual approach to the doctrines, collections of doctrines, and subject as a whole.

There have been three main approaches to the teaching of advanced torts. The first approach, "the traditional canon of economic and dignitary torts," uses the customary means of classifying torts according to the interest invaded and actor's conduct to define the subject matter of advanced torts.[7] This approach is used in the Dobbs and Bublick casebook, extending the format of Dobbs's popular hornbook.[8] The second approach, the relational interests approach, is based on Leon Green's realist-era analysis of tort law and was used in successive editions of Green's own casebook and currently in the Kutner and Reynolds casebook.[9] The third approach, the torts and trade regulation approach, links economic torts to other doctrines of market regulation.[10] This approach has its origins in the early era of antitrust and has since incorporated strong elements of intellectual property; it is used in different ways in different casebooks today.

TORTS v (2001); *see also* PETER CANE, TORT LAW AND ECONOMIC INTERESTS (1996); TONY WEIR, ECONOMIC TORTS (1997).

6 A possible exception that emphasizes the residual nature of the course is GEORGE C. CHRISTIE, JAMES E. MEEKS, ELLEN S. PRYOR & JOSEPH SANDERS, ADVANCED TORTS: CASES AND MATERIALS (2004), which covers products liability and the role of insurance in the tort system, as well as economic and dignitary torts. The book is designed to cover "in depth some of the important topics of tort law that are either not covered or not covered in much depth in their basic torts course." *Id.* at v.

7 *See infra* notes 10–15 and accompanying text.

8 DAN B. DOBBS, THE LAW OF TORTS (2000).

9 *See infra* notes 16–25 and accompanying text.

10 *See infra* notes 26–43 and accompanying text.

This Article draws on these three approaches to rethink the course, arguing for a particular business torts approach. This approach adds elements of an advanced contracts course to the advanced torts course, more prominently considering doctrines that provide liability and remedies in contractual settings beyond those traditionally afforded by contracts law. The rethinking suggests a link from the model of contracting that underlies these doctrines to the model of the market—which is made up of contracts—that underlies much of the market-regulating tort doctrines.

A. The Traditional Canon: Economic and Dignitary Torts

Tort law is conventionally subdivided according to the interest of the victim that is invaded and the nature of the tortfeasor's conduct, with all divisions made along doctrinal lines. The familiar categories are physical injury to the person, physical injury to property, and non-physical injury (divided by interest); and intentional torts, negligence, and strict liability (divided by conduct). The divisions are not always clean, and there are intermediate and overlapping categories. Non-physical injury includes both harm to solely pecuniary interests and harm to other interests such as reputation. Wrongful death and survival actions are technically economic but are usually treated as parasitic on physical harms, as negligent infliction of emotional distress often is, too. Either the interest or the nature of the conduct can be considered primary.[11] Products liability is often pulled out for separate treatment.

This conventional approach to tort classification provides an easily available approach to classifying advanced torts. Dan Dobbs and Ellen Bublick use a primary focus on interests invaded and a subsidiary use of actor's conduct in their recent casebook on advanced torts.[12] This focus defines a "traditional canon of economic and dignitary torts—those not associated with physical harm to person or property"[13]—traditional in the sense that it uses the traditional mechanisms of classification even though they have not often been used in teaching materials. The interests invaded are defined by exclusion; what unites "economic or commercial harm" and "dignitary affronts akin to or including emotional harms" is that "none of these torts arises out of physical harm or physical contact."[14]

The conventional approach covers two general categories: "tort claims that are often primarily based on intangible injuries of a highly personal or

11 *Compare* DOBBS, *supra* note 8, chs. 2–3, *with* RICHARD A. EPSTEIN, TORTS ch. 1.B (1999).

12 *See* CHRISTIE ET AL., *supra* note 6, for a similar treatment in the portion of their book that addresses non-physical injury.

13 DOBBS & BUBLICK, *supra* note 3, at v.

14 *Id.* at 1.

dignitary nature" and "torts that are primarily economic in nature."[15] The multiple qualifiers—"often" and "primarily"—are necessary because the torts redressing intangible harm, such as defamation, often have a large economic component, and the economic torts sometimes protect noneconomic interests, such as the tort of bad faith breach of an insurance contract that protects the insured's interest in emotional security.

The dignitary torts include:

- defamation;
- the privacy torts of intrusion, false light, and disclosure of private facts (excluding the right of publicity, which is put in with the economic torts);
- tortious litigation and tactics (malicious prosecution of a criminal charge, wrongful civil litigation, and abuse of process); and
- interference with family relationships (the mostly archaic alienation of affection and criminal conversation and the more current abduction, harboring, or alienation of children, all treated very briefly).

The economic torts include:

- "some nominate torts" (disparagement, bad faith breach of contract, fiduciary breach, and conversion of intangibles);
- intentional interference with contracts and economic opportunities;
- unintended interference with economic interests (products and the economic loss rule, and negligent interference with economic interests and reputation);
- unfair competition and associated aspects of intellectual property (copyright, trade secrets, misappropriation, trademark, and the right of publicity);
- misrepresentation;
- statutory protection against misrepresentation and deceptive practices (consumer protection, RICO[16], and others); and
- lawyer malpractice.

15 *Id.* at 3. The authors suggest that, at least for teaching purposes, the categories are also linked in ways other than their place in the taxonomy of torts. Issues that arise frequently in civil litigation are included, and "fundamental policy and theory issues" arise under many of the doctrines. *Id.* at vi.

16 The Racketeer Influenced and Corrupt Organizations Act, commonly referred to as the RICO Act or RICO, is a federal statute that provides for extended penalties for criminal acts performed as part of an ongoing criminal organization. *See* 18 U.S.C.A. § 1961 (West 2007).

B. Relational Interests

As part of his reexamination of tort law in the era of legal realism, Leon Green offered a refinement on the classification of tort law according to the interest invaded. Common-law torts traditionally had developed around the interests of person and property. As the courts began to protect economic and dignitary interests, the tendency was to do so by framing them as extensions of the familiar protection of property.[17] Green's innovation was to construct a category of relational interests to encompass the new claims and then to subdivide the category according to the type of relation invaded. For the purposes of analysis as well as teaching, Leon Green famously defined "relational interests";[18] while much commented on, the classification never achieved wide acceptance. In a series of articles[19] and his heretical casebook,[20] Green argued that injuries to relations constituted a distinct sphere of tort law. "The situation is this: plaintiff stands in some relation to some other person; defendant hurts plaintiff's relation with that person."[21] The interest protected is the relation. The value of the relation may be diminished in a number of ways:

> The relation may be hurt by a physical injury of one of the parties to the relation, as for example the killing of a member of the family; by appropriating the advantages of the relation or by destroying it, as for example inducing one party to violate his contract with another; by impairing the standing of a person in his community, as for example publishing an accusation of his dishonesty in business or office; or by denying a person some right he enjoys as a member of a social or political group, as for example the right to vote or hold office or other right of citizenship.[22]

17 Leon Green, *Basic Concepts: Persons, Property, Relations*, 24 A.B.A.J. 65 (1938); *see also* LEON GREEN, THE LITIGATION PROCESS IN TORT LAW: NO PLACE TO STOP IN THE DEVELOPMENT OF TORT LAW 413 (2d ed. 1977).

18 *See generally* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 75–113, 149–53 (expanded ed. 2003).

19 Leon Green, *Relational Interests*, 29 U. ILL. L. REV. 460 (1934); Leon Green, *Relational Interests: Trade Relations*, 29 U. ILL. L. REV. 1041 (1935); Leon Green, *Relational Interests: Commercial Relations*, 30 U. ILL. L. REV. 1 (1935); Leon Green, *Relational Interests: Professional and Political Relations*, 30 U. ILL. L. REV. 314 (1935); Leon Green, *Relational Interests: General Social Relations*, 31 U. ILL. L. REV. 35 (1936). For a later summary, see Leon Green, *Basic Concepts: Persons, Property, Relations*, 24 A.B.A.J. 65 (1938).

20 LEON GREEN, THE JUDICIAL PROCESS IN TORT CASES (1931).

21 Leon Green, *Relational Interests*, 29 U. ILL. L. REV. 460, 462 (1934).

22 LEON GREEN, WILLARD H. PEDRICK, JAMES A RAHL, E. WAYNE THODE, CARL S. HAWKINS, ALLEN E. SMITH & JAMES E. TREECE, ADVANCED TORTS: INJURIES TO BUSINESS, POLITICAL AND FAMILY INTERESTS xiii (1977) (quoting the 1949 and 1969 editions of the casebook).

The relational interests include family relations, trade relations, professional relations, general social relations, and political relations.[23] The relational interests matched no other classification scheme; defamation was included in professional, political, and general social relations. Nor were the relational interests purely what are today regarded as economic interests; the principal injury to family relations comes from death or injury to a family member giving rise to wrongful death or survival actions. Green's category of trade relations encompassed much of economic torts, however. Green's family relations include wrongful death and survival actions, personal injuries among or affecting family members, actions relating to ill and deceased relatives, and alienation of affection and related torts. Professional relations resemble trade relations except that they involve the relations held by professionals, not businesses, and involve the professionals' general standing in the community and economic interests. General social relations are the right of people generally to have unimpaired social relations, principally the protection of reputation through the law of defamation. Political relations encompass defamation of and by public officials and interference with the rights of citizenship such as violating civil rights and misusing government power such as through malicious prosecution.

Most important for present purposes are trade relations, sometimes described as commercial relations. Green described the scope of injuries to trade relations in different ways in a number of books and articles over a span of decades. A useful list can be drawn from the most recent version of Green's casebook (which is no longer in print).[24] Trade relations there include:

- interference with patronage or customer relations (physical interference by violence or threat, malicious competition, cartels and boycotts by competitors and non-competitors, passing off, trademark infringement, defamation, disparagement, and false advertising);
- interference with business operations (physical interference; appropriation of intangible assts in the public domain or not in the public domain such as trade secrets, employee's knowledge or loyalty, ideas, characters, and likeness); and
- interference with contractual relations (covenants not to compete and other contracts).

The contemporary book that most embodies Green's relational interests is Peter Kutner and Osborne Reynolds's *Advanced Torts*.[25] Intended to fill the gaps left by subjects not typically included or adequately treated in

23 *Id.*

24 *Id.*

25 PETER B. KUTNER & OSBORNE M. REYNOLDS, JR., ADVANCED TORTS: CASES AND MATERIALS (3d ed. 2006).

the first-year course, the book's scope self-consciously emulates Green.[26] The selection of topics largely follows Green's list, although the arrangement is different. The chapters include:

- family relations (injuries to family members, interference with family relationships, and wrongful birth);
- economic relations (interference with contract and prospective advantage, and negligent interference with economic relations);
- marketplace falsehoods (injurious falsehood or disparagement, passing off and unfair competition, and false advertising);
- intangible assets (trade secrets and confidential information; and misappropriation of literary, artistic, and commercial creations including ideas);
- publicity and privacy (appropriation, intrusion, disclosure of private facts, and false light);
- defamation; and
- judicial process and civil rights (malicious prosecution, wrongful civil proceedings, abuse of process, and interference with civil rights).

C. Trade Regulation

The traditional canon, interest-focused approach and Green's relational interests share a primary orientation to the common law of torts, supplemented only by modest excursions into statutory analogues such as deceptive practices acts, intellectual property, or other topics that are necessary to fully explore the issues raised by common-law liability. A very different approach addresses economic torts as an instrument of trade regulation. This approach has a long lineage and has developed in interesting and different ways in contemporary approaches to the material.

Early casebooks addressed only antitrust[27] until Herman Oliphant published the first broader casebook on trade regulation in general in 1923.[28] The casebook surveys common law and statutory rules that address market competition. After a remarkable historical survey (including discussions of the pre-market manorial village, the influence of the Black Death, the rise and fall of the guilds, and laissez faire as striking the shackles from the hands of labor, among other topics),[29] the casebook begins with a case from

26 *Id.* at iii.

27 *See* ALBERT M. KALES, CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE (1918).

28 HERMAN OLIPHANT, CASES ON TRADE REGULATION (1923). Oppenheim describes Oliphant's casebook as the first to combine the study of unfair competition and antitrust. S. CHESTERFIELD OPPENHEIM, CASES ON TRADE REGULATION 2–3 (1936).

29 OLIPHANT, *supra* note 28, at 1–33.

the Yearbooks in 1415 concerning a dyer's covenant not to compete[30] and concludes with the Sherman Act and other antitrust laws. Consistent with the pedagogical style of early casebooks, text, explanation, and notes are virtually absent.

Oliphant's book contains three parts: contracts not to compete, competitive practices, and combinations.[31]

The part on contracts not to compete includes:

- contracts in early English trade (showing the ancient lineage of the doctrines);
- contracts concerning the use of skill or enterprise (covenants by employees or in the sale of a business, and trade secrets); and
- contracts tending toward restraint of trade or creating a monopoly or combination.

The part on competitive practices includes:

- unfair competition (malicious competition and intimidation);
- disparagement;
- appropriation of trade values (trademarks, trade secrets, deceptive advertising, ideas, and other misappropriation);
- interference with contract;
- boycotts and exclusive dealing arrangements;
- unfair price practices (minimum pricing); and
- unfair advertising (passing off and Federal Trade Commission regulation of deceptive advertising).

The part on combinations includes common-law regulation of contracts in restraint of trade and the federal antitrust laws.

Oliphant was followed by Chesterfield Oppenheim, whose casebook first appeared in 1936 and remains in print.[32] Oppenheim followed Oliphant's concept of trade regulation and expressed its implicit idea, that "the delictual aspect of trade relation cases can be more effectively considered when integrated with the doctrine of unfair competition."[33] Contracts not to compete play a less prominent role for Oppenheim than Oliphant, but Oppenheim follows Oliphant in making a primary division of the subject into 1) unfair competitive practices and competition and 2) monopoly. Op-

30 Y.B. 2 Hen. 5, fol. 5, Anon. pl. 26 (1415); *see also* OLIPHANT, *supra* note 29, at 34.

31 *See* OLIPHANT, *supra* note 28. This is a summary of some categories, and many are described in more contemporary terms.

32 PETER B. MAGGS & ROGER E. SCHECHTER, TRADEMARK AND UNFAIR COMPETITION LAW: CASES AND COMMENTS (6th ed. 2002).

33 S. CHESTERFIELD OPPENHEIM, CASES ON TRADE REGULATION 4 (Warren A. Seavey ed., 1936).

penheim also includes the same topics as Oliphant, although rearranged in their order.

Over time the emphasis of the trade regulation approach has shifted. Now the common-law remedies for unfair trade practices are more likely to be linked to intellectual property than to antitrust and related regulatory bodies of law. The shift can be seen dramatically by comparing the fourth edition of Oppenheim's casebook, published in 1983 and the last to bear his name as co-author,[34] with the current sixth edition, edited by successor authors Peter B. Maggs and Roger E. Schechter.[35]

By the time the fourth edition was published, antitrust had become established as an independent subject. As a result, the core antitrust issues of combination and monopoly receive limited mention in the casebook, with reference to some of the co-authors' antitrust casebook.[36] The editors note other developments: the rise of consumer protection, the increasing importance of economic analysis, and new statutes and judicial opinions. Those developments and with the notable addition of copyright, the topics covered are similar to those of the first edition:

- competition (common law privileges to enter markets and interference with contract and prospective relations);
- trademarks;
- misappropriation;
- copyright
- deceptive advertising, disparagement, and defamation;
- Federal Trade Commission regulation;
- consumer remedies for unfair and deceptive practices;
- the Robinson-Patman Act[37]; and
- state regulation of unfair pricing.

In the sixth edition, the authors recognized that "legal, economic and social developments require a thorough rethinking of the organization and content of a teaching book."[38] Trademark and closely related topics (such

34 S. CHESTERFIELD OPPENHEIM, GLEN E. WESTON, PETER B. MAGGS & ROGER E. SCHECHTER, UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION (4th ed. 1983).

35 *See* MAGGS & SCHECHTER, *supra* note 32. The fifth edition, mostly following the pattern of the fourth, was published in 1992 under a different title. *See* GLEN E. WESTON, PETER B. MAGGS & ROGER E. SCHECHTER, UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION (5th ed. 1992).

36 S. CHESTER OPPENHEIM, GLEN E. WESTON & J. THOMAS MCCARTHY, FEDERAL ANTITRUST LAWS: CASES, TEXT, AND COMMENTARY (4th ed. 1981). Collateral antitrust issues such as price discrimination are covered in the casebook.

37 The Robinson-Patman Act of 1936, or Anti-Price Discrimination Act, is a federal law that prohibits anticompetitive practices by producers, specifically price discrimination. *See* 15 U.S.C.A. § 13 (West 2007).

38 MAGGS & SCHECHTER, *supra* note 32, at v.

as Internet domain name disputes) became the core of the book, which expanded from 190 pages in the fourth edition to nearly 600 pages in the sixth edition. The brief chapter on competition remains as an introduction; misappropriation and competitor, consumer, and public remedies for deceptive advertising make up the rest of the book. The authors removed copyright and price discrimination from the book to create space for the accommodation of new materials,[39] but the prominence of copyright in other courses and the insignificance of price discrimination are as likely reasons.

The same transformation of the trade regulation approach can be seen in the casebook written by Edmund Kitch and Harvey Perlman. The first edition of their casebook, *Legal Regulation of the Competitive Process: Cases, Materials and Notes on Unfair Business Practices, Trademarks, Copyrights and Patents*, published in 1972,[40] demonstrated the lack of clear definition of the subject by aptly (if vaguely) describing the contents of the book as "a collection of apparently diverse areas of law related in some way to business activity."[41] The authors explained:

> Most law schools offer courses in anti-trust, in which the grand scheme of free-enterprise economic regulation is considered. To the extent anti-trust doctrines are successful, they tend to insure that business will be conducted along competitive lines. The rules of the competitive process, once competition is assured, are generally ignored.
>
> We have attempted to draw together in one book, numerous doctrines, which regulate the activity of competition . . . . We have tried to explore the interrelationships of the areas presented and the fundamental legal concepts and developments which pervade the competitive process.[42]

In the first edition, Kitch and Perlman reported that "[t]rademarks, copyrights, and patents, if available [in the law school curriculum], are generally taught in advanced seminars designed for students wishing to specialize in these areas."[43] In the current fifth edition, the title of the book—now retitled *Intellectual Property and Unfair Competition*, with no explanatory subtitle[44]—and its emphasis have changed, adding intellectual property materials to the chapter on the problem of entry, eliminating the chapter on pricing practices, reducing the emphasis on consumer remedies

39 *Id.*

40 EDMUND W. KITCH & HARVEY S. PERLMAN, LEGAL REGULATION OF THE COMPETITIVE PROCESS: CASES, MATERIALS AND NOTES ON UNFAIR BUSINESS PRACTICES, TRADEMARKS, COPYRIGHTS AND PATENTS (1972).

41 *Id.* at xvii.

42 *Id.*

43 *Id.*

44 EDMUND W. KITCH & HARVEY S. PERLMAN, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION (5th ed. 1998).

for deception, and giving concomitantly more space and weight to trademarks, copyrights, and patents.[45]

II. Issues in Teaching Advanced Torts

The advanced torts course is in part residual and local, addressing topics that are treated inadequately, or not at all, in the first-year torts course. Nevertheless, constructing the course ought to be more than assembling a plate of leftovers. A substantial degree of conceptual unity is desirable both because it helps make sense of the law school curriculum and, for students, of the course itself. What is the most useful and interesting concept of the advanced torts course in a law school that teaches personal injury torts in the first year and intellectual property and antitrust in the upper level? For students, what holds together the topics in the course other than that they are things many lawyers should know?

Consideration of the traditional canon, relational interests, and trade regulation approaches to the course raises some issues concerning the construction of the course. On none of the issues is there unanimity among these approaches; on each of them, the approaches suggest alternatives. The issues are (1) the extent to which the course focuses on torts or on another subject, and how specialized bodies of law are treated; (2) the extent to which the course focuses on civil litigation, particularly subjects that are important in a typical civil litigation practice; and (3) the extent to which the course focuses on economic torts and how economic torts as a subject matter is defined and conceptualized.

A. Torts as the Focus?

The first issue is the extent to which the course focuses on torts or on another subject and how specialized bodies of law are treated. Although all of the topics of the course have relatively simple common-law origins, many of them have developed highly specialized bodies of law. If the focus of the course is to remain on advanced torts, many of these topics deserve mention but cannot receive extensive treatment. This is particularly true, and the need for full treatment is particularly obviated, for those topics that are the subject of stand-alone courses. Consumer fraud and consumer protection statutes relate to the remedies for deceptive trade practices, for example, but they are sufficiently complex that anything more than introductory treatment belongs in a consumer law course.

45 Other books in this area add elements of unfair competition to a predominant emphasis on trademarks. *See, e.g.*, Jane C. Ginsburg, Jessica Litman & Mary L. Kevlin, Trademark and Unfair Competition Law (3d ed. 2001); Beverly W. Pattishall, David Craig Hilliard & Joseph Nye Welch II, Trademarks and Unfair Competition (4th ed. 2000).

Some versions of the trade regulation approach favor these specialized subjects at the expense of more extensive treatment of the common-law tort actions. When antitrust law was less fully developed, Oliphant combined antitrust with the tort materials on competitive practices into a single course.[46] The contemporary core of trade regulation is intellectual property, not antitrust, and Kitch and Perlman have taken the step of making intellectual property primary and economic torts secondary;[47] at that point, the course is much less an advanced torts course and much more an intellectual property course with ancillary materials on competition and related subjects.

B. Civil Litigation as the Focus?

The second issue is the extent to which the course focuses on civil litigation, particularly subjects that are important in a typical civil litigation practice. Resolving this issue shapes the emphasis of the course and the inclusion of topics.

Every doctrine-based law school course mixes examination of the substance of the law and the way that substance is used in practice with consideration of broader issues—what is usually referred to as "policy" and other more general or theoretical issues that arise. The issue here is one of degree. Particularly in the portion of the course that addresses economic rather than dignitary torts, there can be two tendencies.

One tendency emphasizes that economic torts constitute the core of many lawyers' non-personal injury civil litigation practice. Misrepresentation and interference may be the most powerful and frequently used weapons in the civil litigator's arsenal, for example, with breach of fiduciary duty and misappropriation following closely. From this perspective, the primary question in the course is how lawyers use economic torts to support and defend the business activities of their clients.

The other tendency emphasizes the policy issue that is entailed in many of the economic torts: how the law should regulate competitive behavior in the marketplace. From this perspective, the basic question is fairness and utility, as expressed through doctrines that control relations between bargaining parties and between businesses and their customers and competitors. A course with this tendency is likely to devote more attention to some of the specialized subjects mentioned above because of their importance in establishing and controlling competition. In addition, many topics in the course involve statutes that regulate market activity, with regulation being accomplished through administrative enforcement (such as the FTC Act[48]

46 *See* OLIPHANT, *supra* note 28.

47 *See* KITCH & PERLMAN, *supra* note 44.

48 Federal Trade Commission Act, 15 U.S.C.A. §§ 41–58 (West 2007).

and state unfair trade practices acts) or even criminal prosecution (such as RICO[49]), as well as through civil litigation by competitors or customers. Under this tendency, more extensive attention may be given to the parallel regulatory structure as a means of effectuating policy, even though it is of less importance in day-to-day law practice. Under the first tendency, by contrast, those parallel enforcement structures deserve mention to provide a complete understanding of the topics, but they deserve close examination only to the extent that they arise with frequency in a civil litigation practice. For example, private actions under state consumer protection laws deserve more consideration than actions by federal or state agencies.

The choice between these tendencies affects the topics included in the course as well as its emphasis. Several doctrines that are not primarily directed at competitive behavior figure frequently in business litigation. The two most important sets of such doctrines are the wrongful litigation torts—malicious prosecution of criminal or civil cases, abuse of process, and the related anti-SLAPP measures—and the two related doctrines of aiding and abetting and conspiracy. An emphasis on civil litigation practice needs to include them because of their importance; an emphasis on competitive regulation may exclude them.

C. Economic Torts as the Focus?

The third issue is the extent to which the course focuses on economic torts, and how economic torts as a subject matter is defined and conceptualized. The basic choice here is between a more general advanced torts course and what is better described as a business torts course. In the traditional canon and the relational interests approaches, the selection of topics for inclusion is based on the interests that are invaded, many of which have little or nothing to do with market competition. In the traditional canon, the interests are defined as the residue of the first-year course's primary focus on physical injuries, so the interests affected are dignitary and other intangible interests and the interest in avoiding solely economic harm. In the relational interests approach, the interests are the idiosyncratic set of relational interests defined by Green that are also the residue of tort law's main attention to physical injury. Business torts, as suggested by the trade regulation approach, instead focuses on doctrines aimed primarily at defining and regulating appropriate means of market competition. As a result, the business torts approach excludes intentional infliction of emotional distress and the family relations torts. Prosser classified the privacy torts to include appropriation of identity, intrusion, false lights, and disclosure of private facts;[50] only the former of those is market-directed and typically

49 18 U.S.C.A. §§ 1961–1968 (West 2007).

50 William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

figures in business tort litigation. Commercial defamation is a business tort, but the extensive treatment of defamation in general, including all of the constitutional issues, given under a broader advanced torts approach is less suited to a business torts focus.

More broadly defined, business torts includes not only doctrines aimed primarily at defining and regulating appropriate means of market competition, but also issues arising out of contractual relationships other than ordinary breach of contract. The primary impetus for an advanced torts course is the gap in coverage of the first-year torts course. There is a parallel gap in the typical first-year contracts course, in which issues such as the conflict between contract and tort law embodied in the economic loss rule (among other places), misrepresentation, and bad faith breach are covered inadequately, if at all.

III. An Example: Teaching Business Torts

The issues about the extent of focus on advanced torts, civil litigation, and economic torts can be resolved in a variety of ways. Each of the casebooks discussed provides an example of a different resolution of the issues. Here is an additional example of a course that adopts a civil litigation, economic torts emphasis.

This course covers the following topics in the following order:

- The economic loss rule
- Breach of fiduciary duty
- Misrepresentation in two-party cases
- Good faith in contract and bad faith breach of contract
- Economic negligence, defined as the liability of professionals and businesses to third parties (i.e., not to their contracting partners)
- Interference with contract and interference with prospective economic advantage
- Unfair competition, including antitrust, RICO,[51] liability under unfair trade practices statutes, and the residual common-law unfair competition action
- Copyright, briefly, as it plays a role in business tort litigation between competitors and as a comparison to trademark
- Trademark, including dilution
- Deception, including the appropriation of trade values broader than trademark, Lanham Act §43(a),[52] and passing off

51 18 U.S.C.A. §§ 1961–1968 (West 2007).

52 15 U.S.C.A. § 1125(a) (West 2007).

- Disparagement, including product disparagement and commercial defamation
- Misappropriation, including identity, trade secrets, and common-law misappropriation
- Wrongful litigation
- Aiding and abetting, and conspiracy

This list most resembles the economic torts portion of Dobbs and Bublick's traditional canon,[53] excluding coverage of the dignitary torts, which are not primarily concerned with market competition. It also includes elements of the modern versions of Green's trade relations and the trade regulation approaches.[54] The more distinctive feature of this approach, then, is not the selection of topics but their arrangement, which is largely based on the definition of economic torts.

The first half of the course builds around the part of the broad definition of economic torts that addresses issues arising out of contractual relationships other than ordinary breach of contract; these issues are covered in the economic loss rule, two-party misrepresentation, the obligation of good faith and bad faith breach, economic negligence, and interference. These issues are not ordinarily covered in the first-year contracts course, and that makes it useful to examine them and to do so together. But there is a conceptual link as well. A main purpose of contract law is to enforce bargains made by knowledgeable parties who have freely bargained to advantage. The liability and remedy rules of ordinary contract law are adequate to serve that purpose in most instances, but in these classes of cases those rules are arguably inadequate.

Each of the doctrines in the first half expresses that purpose. The economic loss rule establishes the primacy of this concept of bargaining by preventing incursions of tort law into contractual settings. The principal exception to the economic loss rule is fraud in the inducement; contract assumes fair bargaining by parties who are or have the opportunity to be informed about relevant facts, and misrepresentation by one party subverts that process. Contract also assumes that parties who have entered into a contract will not violate the norms of contracting or take opportunistic advantage; bad faith performance or breach betrays that assumption. Contractual stability is an important social value, and it must be protected from attack; contracts are attacked by tortious interference with contractual relationships or prospective contractual relationships.[55]

53 *See* DOBBS & BUBLICK, *supra* note 3.

54 *See supra* note 19 and accompanying text.

55 The metaphor of contract being subverted, betrayed, or attacked is an expansion of Hugh Collins's likening of classical contract law to an emperor who has absolute power capable of being undermined only by force or treachery. *See* Jay M. Feinman, *Contract After the Fall*, 39 STAN. L. REV. 1537, 1543 (1987); *see also* HUGH COLLINS, THE LAW OF CONTRACT 58 (1986).

The remaining topics are fiduciary duty and economic negligence. The existence and scope of a fiduciary duty sometimes can be shaped by a contract, but the idea of fiduciary duty is broader than contract. Economic negligence, or liability to a noncontracting third party, involves an extension of contract, not the protection of contractual relationships. Considering fiduciary duty and economic negligence therefore raises the question of when contract law can be supplemented or supplanted.

The source and content of fiduciary obligation are defined by the law because of entrustment, dependence, inequality, or other factors that can remove the limitations of contract law.[56] The debate about the nature of fiduciary duty frames the issue sharply. Under the hypothetical contract analysis of fiduciary duty, the law's creation of fiduciary duties is no more than a gap-filler to address issues that parties, typically but not exclusively in contractual settings, have not decided for themselves. The means of filling the gaps is by imagining the deal the parties would have struck had they adverted to the issue—the hypothetical contract reached by rational parties who seek to maximize their joint welfare through the contract. The critique of the hypothetical contract analysis points out that fiduciary duty has long been considered to be imposed for reasons of equity in relations of dependence. In that sense, fiduciary duty is independent of contract and based on external standards of responsibility.[57]

This dispute becomes a recurrent theme throughout the course. There are two conflicting conceptions of the nature of obligation in contractual settings and, more broadly, in the law's interaction with market competition. One is a contract-centered conception, in which the ideal of the bargained contract is primary, and it only needs to be supplemented by external standards and other bodies of law when the preconditions of contracting are absent. The preconditions of contracting include access to information, relative equality of the parties, and the opportunity to bargain. The other is a balanced conception, in which contractual standards of liability and external standards of liability each have independent and equal status, and the issue on a particular doctrine or in a particular case or class of cases is how the balance should be struck between contractual and noncontractual liability.

In fiduciary cases, the conflict between bodies of law is between contract and fiduciary duty. In the other cases, the conflict is between contract and tort. Is contract primary and tort supplemental, as the strong version of the economic loss rule would have it, or do contract and tort each have independent integrity? Economic negligence frames this conflict clearly. Two parties have a contract, the negligent performance or breach of which injures a third party. The third party clearly has a cause of action if it quali-

56 *See* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 887.

57 *Id.* at 886–88.

fies as a third-party beneficiary under contract law. If it does not so qualify, might it still have an action in tort for negligence or negligent misrepresentation because of the interests that those areas of tort law seek to protect?[58]

The same conflict suggests reconsideration of the other topics. Misrepresentation can be seen as supplemental to contract law in cases in which the misrepresentation undermines the bargaining process. However, the first element of the cause of action for misrepresentation is a misstatement of fact, and that element has expanded to include misstatement of intention. This expansion presents cases in which the misstatement of fact takes the form of a misstatement of intention to perform a promise or misstatement of the ability to perform a promise; in those cases, the misrepresentation action becomes available where, because of the strictures of contract law doctrine, the contract action is not available. *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.* is the best known of these cases, in which the New York Court of Appeals allowed a misrepresentation action for what was essentially breach of a seller's promise.[59] Karl Llewellyn—a contracts scholar—condemned the decision as undermining contract law and sparking "as unconsidered a jamboree as ever has been suggested" by torts scholars.[60]

Similarly, the delineation of the contours of the economic loss rule is essentially a debate about the relative scope of contract and tort law. In good faith, the essential issues are the source and content of the good faith obligation. There are two classic views. The foregone opportunities approach holds that the essence of good faith is preventing parties from recapturing gains foregone in the making of the bargain.[61] It is, therefore, of a piece with the hypothetical contract approach to fiduciary duty, designed only to provide contract terms that are implicit in their bargain or to which they would have agreed. The excluder analysis asserts that the obligation of good faith excludes types of bad faith conduct based on community standards external to the contract, and therefore is tort-like in its imposition of obligation.[62]

Interference plays out these ideas in a way that provides transition to the second half of the course. There are two interference torts, interference with contract and interference with prospective economic advantage, and each presents a puzzle.

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58 *See generally* JAY M. FEINMAN, PROFESSIONAL LIABILITY TO THIRD PARTIES (2d ed. 2007).

59 Channel Master Corp. v. Aluminum Ltd. Sales, 151 N.E.2d 833, 836 (N.Y. 1958).

60 KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 473 (1960).

61 Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 378 (1980).

62 Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 201 (1968); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

Interference with contract involves actions by a noncontracting third party that induce a breach of contract or interfere with the performance of a contract by the victim's contracting partner. The victim has a remedy in contract law against the partner for breach of the contract. In many cases that remedy is fully effective to protect the victim's expectation interest, and indeed may be coextensive with the remedy that would be provided by the interference tort. In classic inducement cases, for example, the contract remedy is a negative injunction against the partner to prevent her from entering into a relationship with the third party that would constitute a breach of contract; the tort remedy for interference is an injunction against the third party to prevent him from entering into the same relationship. The puzzle is why the tort remedy is necessary when the contract remedy is available.

Interference with prospective advantage involves similar actions by a third party except that the interest of the victim interfered with is not the performance of a contract because no contract exists. Instead, the interest is in the expectation of a future contractual relationship, such as the expectation of future business from one's regular customers. The puzzle is why this interest is worthy of protection if it has not yet ripened into a contract and may never do so.

The usual answer to the puzzle presented by interference with contract is that society has an interest in contractual stability that demands protection beyond that afforded by contract law. That interest is not fully recognized by a breach of contract action but requires sanction of the interfering third party. The usual answer to the puzzle presented by interference with prospective advantage is two-fold. First, the behavior of the interfering third party may be wrongful in some measure beyond the interference itself; a common test is whether the third party has exercised improper means in taking away the expectancy. Second, contractual relationships are not the only relationships of value in society; customer relations, business goodwill, and the fruits of enterprise should also be protected by law in some circumstances.

This analysis of the interference torts provides the link to the second half of the course. There is a continuum from protection of existing contracts to the protection of prospective relations. For cases farther along the continuum more may be required for legal intervention, just as interference with prospective relations is not wrongful in itself, but there is no doubt that intervention is appropriate in some cases. Intervention is appropriate to sanction improper conduct that interferes with the opportunity to contract fairly—that is, to fairly compete on the market. Thus the continuum can be broadened: Each contract is an individual transaction, and the sum of all transactions—the sum of all contracts—is the market, and the continuum moves from fair contracting through fair competition.

Market-regulating doctrines are in one sense vehicles for effectuating the model of contract in society as a whole. Doctrines such as misrepresentation are necessary to supplement contract law in cases in which the processes of contracting are undermined. Similarly, doctrines such as the regulation of deceptive practices are necessary in cases in which the processes of market competition are undermined. The market is primary, and the competitive values of the market also are primary. One means of enforcing those values is to allow all competitive behavior except for behavior that, as with contract, subverts, betrays, or attacks market competition.

In a different sense, market-regulating doctrines are not only directed at establishing a free market as primary. Like tort law or fiduciary law in the noncontractual perspective, they serve nonmarket goals, such as fairness, the protection of consumers, correcting imbalances caused by market transactions, and the observance of reasonable commercial standards

Thus, for example, the regulation of deceptive practices is not only about establishing adequately informed contracting but also about redressing the balance between large producers and small consumers.

The continuum from contracting to competition moves from interference with prospective relations to interference with competitive processes generally, and moves the course from the focus on contract to the focus on competition. For example, under the broad rubric of unfair competition, antitrust speaks to efforts at subverting normal market processes through monopolization, attempts to monopolize, or the traditionally defined class of contracts in restraint of trade, but it speaks to those efforts in different voices. Beginning with the debates over the Sherman Act[63] and continuing to the present, a frequent debate has been whether antitrust is intended only to preserve a competitive marketplace or is designed to serve other goals as well, such as an attack on "bigness" and the protection of small businesses. State and federal statutes such as the Federal Trade Commission Act[64] and unfair and deceptive practices acts likewise have different emphases. Many of the state statutes specify particular actions that are improper. The Pennsylvania act, for example, lists seventeen specific types of wrongdoing.[65] Other statutes and the FTC Act take a general approach, prohibiting unfair and deceptive practices and leaving it to the administrative agency and the courts to spell out what that means. In fleshing out the general statutes, decisionmakers must consider to what extent nonmarket goals are to be served by regulating competition.

The broadest question in the law of unfair competition is whether there are general standards of morality in the marketplace that the law should impose for reasons other than establishing the preconditions of fair compe-

63 Sherman Act, 15 U.S.C.A. §§ 1–7 (West 2007).

64 Federal Trade Commission Act, 15 U.S.C.A. §§ 41–58 (West 2007).

65 Pa. Unfair Trade Practices Act, 73 PA. CONS. STAT. § 201–2(4) (2004).

tition. The question is posed sharply in considering the *Restatement Third of Unfair Competition*. The Restatement takes an extreme position; its section one contains what may be the only general statement of non-liability in any of the Restatements: "One who causes harm to the commercial relations of another by engaging in a business or trade is not subject to liability to the other for such harm unless" he violates a specific prohibition of the Restatement, which include only deceptive marketing, trademark infringement, or misappropriation, or a statute.[66] Section 1(b) includes a residual provision for acts prohibited by "general principles of common law," but the comments suggest that the residuum is severely limited.[67]

Other topics in the course address more specific ways in which the law protects and regulates market competition. Trademark, for example, exists only because it has market value. The value of a trademark is the association in the marketplace between the mark and its owner or, as it is often stated, between product and producer. That association defines the very existence of a trademark; once a trademark loses that association by becoming generic, it no longer is a trademark. Copyright provides an interesting comparison. Copyright is a property right that exists independent of market value; the author has a copyright in an original work of authorship that has no commercial value at all. Copyright serves market and nonmarket goals; the promotion of "science and useful arts"[68] encourages development in the commercial and noncommercial spheres

From the market perspective, deception, disparagement, and commercial defamation are extensions of the interest in fair competition. Consumers require accurate information, so competitors should be able to impose liability for misrepresentations directed at the marketplace. Thus deception moves beyond trademarks to protect the value of fair competition in the representation of products (either the plaintiff's or the competitor's) and advertising, as under Lanham Act sections 43(a) and 43(b),[69] and in the reputation of one's business or products. Each requires proof of wrongfulness, deception, and competitive effect. The element of wrongfulness introduces the regulatory theme, but the focus is on market effects.

Misappropriation more clearly has dual aspects. On the one hand, misappropriation doctrines are property-like, protecting established interests against invasion. On the other hand, they are market-oriented, protecting trade values that resemble property but limiting the scope of protection to their use in competition. As the law of trade secrets has developed, it has moved more in the direction of limiting protection to information that

66 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 (1995).

67 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1, cmt. g (1995). The venerable *Tuttle v. Buck*, 119 N.W. 946, 948 (Minn. 1909), suggests one traditional component of the residuum—competing with an ill motive—but the Restatement rejects even that.

68 U.S. CONST. art. I, § 8.

69 15 U.S.C.A. § 1125(a), (b) (West 2007).

has substantial economic value, which value is often demonstrated by the owner's efforts to preserve its secrecy. In the law of identity, there is a conflict between its traditional association with the law of privacy—protecting a person's right to control name or likeness as a matter of personal autonomy—and an approach that views identity simply as another marketable commodity, protectible only because it could be or even has been exploited by its owner. Once again, the *Restatement of Unfair Competition* adopts a narrow, market-focused view that limits misappropriation to trade values and even rejects the kind of general action for misappropriation decribed in *International News Service v. Associated Press*, 248 U.S. 215 (1918), except in the circumstance of direct competition in one's primary market.[70]

Finally, wrongful litigation and aiding and abetting and conspiracy are essential to the course because of their importance in civil litigation, but they do not fit the pattern of market regulation. They are frequently used in cases involving competitors and overlap other causes of action, often establishing liability among all defendants for acts directly committed only by some of them. Their presence confirms the importance of nonmarket values as a source of liability.

IV. Pedagogical Issues

As it is usually stated, the core of the law school curriculum is accumulating a base of doctrinal knowledge and acquiring the skill of "thinking like a lawyer"—analyzing cases and statutes and generating legal arguments. Most of that skill and much of the knowledge is acquired at a basic level in the first year, and doctrinal courses thereafter only offer more of the same—more practice at analysis and argumentation and more knowledge to acquire.

Almost since Langdell and Ames created the modern law school, it seems, this model of the upper-level curriculum has been criticized precisely because it is just more of the same. Upper-level courses of this sort do not advance students' abilities in a dramatic way, nor do they offer opportunities to learn other valuable lawyer skills. A variety of efforts have attempted to remedy these deficiencies: seminars, advanced simulations, clinical programs, capstone courses, and even reorientation of the upper-level.

In most law schools, the future will be much like the past. Despite the variety of new offerings, students after their first year will continue to take a large number of courses that are defined by bodies of doctrine and that are taught with large enrollments in traditional class-hour formats. Advanced torts or business torts is one of those courses. Conceptualizing the subject

70 Restatement (Third) of Unfair Competition § 38 cmt. c (1995).

matter of the course as this Article has done is only the first step. The second step is conceptualizing the teaching of the subject matter.

Business torts is not unique among upper-level courses, so much of what might be done with it from a teaching perspective applies to other courses, too. The course does have several features that are sufficiently distinctive and interesting that they provide more reason for offering the course. The themes also suggest some pedagogical approaches that are particularly useful in the course.

First, the course builds more directly than many other courses on material studied in the first year of law school. The first half of the course requires an extensive review of basic contract and tort principles, and those principles, together with some understanding of the nature of property, resonate throughout the second half of the course.

Second, the course has a limited set of themes that arise in connection with almost every doctrinal issue in the course. The themes provide the means of developing and rehearsing a common argumentative structure across the doctrines. The link from bargained contract to market competition and the idea that contract and competition are core values is central to the course. The idea of nonmarket values recurs as a counter-theme.

Third, the doctrines studied are cumulative as well as sequential. For example, misrepresentation and interference may be the most general torts studied, and they arise often in cases involving other issues. Many cases lie at the borderland of misrepresentation, fiduciary duty, and unfair competition. A party who is in a relationship that does not fall within a classic fiduciary duty may nevertheless arguably owe a quasi-fiduciary duty, a heightened duty that is violated by a nondisclosure actionable as a misrepresentation, or a duty to act in a manner that does not violate norms of competition. Actions between competitors for marketplace falsehoods often involve trademark, section 43(a),[71] and product disparagement.

Fourth, although the doctrines in the course have strong theoretical and policy dimensions, the course is focused on the doctrines, theories, and policies as they are manifested in law practice. The civil litigation focus of the course shapes not only the selection of topics but also the orientation of the course.

These distinctive features suggest an approach to the course that introduces students to the doctrine, engages them in applying the doctrine to litigation or litigation-preventing situations, and builds on those situations to examine the theories and policies involved. This approach departs from the more-of-the-same emphasis in upper-level doctrinal courses.[72]

Departing from more-of-the-same first involves using materials that are more expository than is common in basic casebooks. The objective is to

71 Lanham Act, 15 U.S.C.A. § 1125 (a) (West 2007).

72 Materials that illustrate the pedagogical approach in more detail are available from the author.

provide a more efficient means for students to acquire doctrinal knowledge than by reading many cases; that is, to simulate the way practicing lawyers acquire knowledge. Text material is most helpful. Dobbs and Bublick intersperse cases with edited selections from the Dobbs treatise, and that is a useful approach. Taking this further, longer excerpts from treatises or summaries directed at lawyers are most useful. The problem here is cost. The ABA publishes several paperbacks that fit the subject well, but even at classroom discounts their cost is prohibitive. The *Restatement of Unfair Competition*, modestly supplemented by cases and statutes, is an excellent text on unfair competition in general, deceptive marketing, trademarks, and misappropriation, but the ALI recently has ceased publishing the paperback student edition, and the hardcover is expensive.

An alternative is the selection of cases that survey particular topics, which can be reproduced from public domain sources or under license from commercial databases. Perhaps because many of these doctrines are in flux, there are a number of excellent opinions for this purpose, particularly from state supreme courts.

A final alternative is the presentation of basic doctrine and issues through lectures and written materials. When good written materials are unavailable on selected topics, it is not difficult for a professor with a reasonable command of the subject to prepare a lecture with a published outline as an introduction.

If most of the materials are expository, discussion then centers not around the doctrines presented in the materials but their application. The core of the course is a series of problems that require students to apply the doctrines in the role of a lawyer. This is hardly a new idea; both the Christie et al. and Dobbs and Bublick casebooks include a number of problems. But the difference is in requiring problems as the central activity of the course, rather than one among several.

Some problems can be relatively simple, to explicate the elements of a doctrine as applied to a range of situations. For the most part, though, the problems should be complex and cumulative. A relatively detailed statement of facts requires students to identify relevant facts and the causes of action that may be available on those facts, confront the ambiguity of the doctrines in application, and consider problems of proof in establishing the causes of action. As the semester goes on and problems become more cumulative, they require students to understand how a single set of facts can give rise to many causes of action and to consider the relationship of different doctrines as they overlap on the facts. The result of this kind of advanced exercise is to require students to bring to bear different bodies of knowledge, including not only all of the subject matter of the course but material from other courses as well, from contracts and torts through evidence and procedure. It also requires students to integrate knowledge and skill, identify issues, evaluate probabilities, make arguments, and some-

times even frame those arguments in writing in a memorandum, complaint, or brief. Finally, it merges theory and practice because understanding the doctrines and arguing the causes of action can be done most effectively by using broad themes such as the goals of market regulation as instantiated in particular cases and doctrines.

Conclusion

The field of economic torts occupies an odd status in the law school curriculum. The torts are central to the practices of many lawyers, and some versions of a course in economic torts have venerable lineages. Yet the course is not as widely taught as it might be, and the emphasis on civil litigation involving economic torts is threatened by incursions from other fields such as antitrust and intellectual property. The Restatement project, the publication of the new Dobbs and Bublick casebook, and the opportunity to use the course to synthesize doctrine and practice may portend more extensive offerings of this important subject.